



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

April 10, 2003

Mr. Michael F. Miller
Assistant City Attorney
City of Galveston
P. O. Box 779
Galveston, Texas 77553-0779

OR2003-2419

Dear Mr. Miller:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179234.

The City of Galveston (the "city") received several requests from the same requestor for the following information: 1) two specified letters; 2) the requestor's "liquor permit spreadsheet"; 3) timesheets regarding three specified city employees for a specified period of time; 4) five specified "direct pay request[s]" with supporting documentation; 5) a specified report for a specified period of time; and 6) specified e-mail correspondence. You indicate that some responsive information does not exist.¹ You claim that the remaining requested information is excepted from disclosure pursuant to section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the submitted information.

We note at the outset that the city did not submit any information to us that is responsive to the request for e-mail correspondence between two specified city employees dated January 31, 2003. We, therefore, presume that the city has already provided the requestor with this information to the extent that it exists. If not, the city must do so at this time. *See* Gov't Code §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (noting

¹ We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 87 (1975), 342 at 3 (1982), 416 at 5 (1984), 452 at 2-3 (1986), 555 at 1-2 (1990), 572 at 1 (1990); *Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed). A governmental body must only make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561 at 8 (1990).

that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

Next, we note that portions of the submitted information, which we have marked, are subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

Gov't Code § 552.022(a)(3). Portions of the submitted information, which we have marked pursuant to section 552.022(a)(3), constitute vouchers relating to the expenditure of public or other funds by the city. This information must be released to the requestor, unless it is expressly confidential under other law. *See id.* We note that section 552.103 of the Government Code is a discretionary exception to disclosure under the Act that protects a governmental body's interests and may be waived.² As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022(a). Accordingly, we conclude that the city may not withhold any portion of these marked vouchers under section 552.103 of the Government Code.

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general); *see also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103).

We now address your claim that the remaining submitted information is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent part:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

- (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code, § 552.103(a), (c). The city maintains the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under section 552.103(a).

A governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture," when establishing that litigation is reasonably anticipated. *See Open Records Decision No. 452 at 4 (1986)*. Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue

the governmental body from an attorney for a potential opposing party.³ *See* Open Records Decision Nos. 555 (1990), 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). After carefully reviewing your representations and the submitted information, we find that the city has failed to establish through concrete evidence that litigation was reasonably anticipated by the city on the date that it received these requests for information. Accordingly, we conclude that the city may not withhold any portion of the remaining submitted information under section 552.103 of the Government Code.

We note that portions of the submitted information are subject to section 552.117(1) of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov’t Code § 552.117(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(1) if the official or employee with whom the information is associated did not request confidentiality for the information in accordance with section 552.024 or if the request for confidentiality regarding the information under section 552.024 was not made until after the request for information at issue was received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989) (finding that whether particular piece of information is public must be determined at time request for it is made). Accordingly, we conclude that the city must withhold all social security numbers, as well as some other information that we have marked within the submitted information, pursuant to section 552.117(1) of the Government Code, if the employees with whom this information is associated requested confidentiality for the information in accordance with section 552.024 prior to the city’s receipt of the respective requests for information.

³ In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

Nevertheless, we note that the social security numbers may be confidential under federal law and, thus, excepted from disclosure pursuant to section 552.101 of the Government Code.⁴ The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). The city has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain these social security numbers. Therefore, we have no basis for concluding that the numbers are confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the city, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing these social security numbers, the city should ensure that they were not obtained or are not maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

Finally, we note that portions of the submitted information are subject to section 552.136 of the Government Code. Section 552.136 makes certain access device numbers confidential and provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

⁴ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Accordingly, we conclude that the city must withhold the account numbers that we have marked within the submitted information pursuant to section 552.136 of the Government Code.

In summary, to the extent that the city has not already done so and the information exists, the city must release to the requestor the information that is responsive to the request for e-mail correspondence between two specified city employees dated January 31, 2003. The city must withhold all social security numbers, as well as some other information that we have marked within the submitted information, pursuant to section 552.117(1) of the Government Code, if the employees with whom this information is associated requested confidentiality for this information in accordance with section 552.024 prior to the city's receipt of the respective requests for information. Nevertheless, the social security numbers may be confidential under federal law. The city must withhold the account numbers that we have marked pursuant to section 552.136 of the Government Code. The city must release the remaining submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be

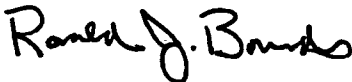
provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 179234

Enc. Marked documents

Mr. Michael F. Miller - Page 8

**c: Ms. Judy Edwards
8008 Seawall Boulevard, Apartment 242
Galveston, Texas 77551
(w/o enclosures)**